JUDICIAL SILENCE ON LEGISLATIVE PROCESS: WHY INDIAN COURTS HAVE NEVER STRUCK DOWN A LAW FOR WANT OF CONSULTATION

Shresi Sinha, Research Scholar, Chanakya National Law University, Patna

ABSTRACT

Indian courts have, over seven decades, read expansive procedural guarantees into Articles 14, 19 and 21 of the Constitution, and have repeatedly affirmed that the citizen's right to know and to participate is integral to democratic governance. Yet no Indian court has ever invalidated a statute solely because Parliament or a State Legislature enacted it without meaningful public consultation. This article examines that silence. It argues that the silence is neither accidental nor doctrinally inevitable. Part II traces the textual immunity that Articles 122 and 212 confer on legislative "proceedings," and the judicially drawn line between procedural irregularity and constitutional illegality. Part III identifies three doctrinal near-misses manifest arbitrariness, natural justice under Article 21, and the right-to-know jurisprudence culminating in Rajeev Suri v. Delhi Development Authority in which the Supreme Court came within reach of a consultation-based standard of review without ever adopting one. Part IV places India in comparative perspective, contrasting the Gunning principles that govern administrative consultation duties in the United Kingdom with the South African Constitutional Court's willingness, in Doctors for Life International v. Speaker of the National Assembly, to invalidate primary legislation for a participation failure. Part V offers three explanations for India's persistent silence doctrinal, institutional and strategic and weighs them against one another. Part VI argues that the more institutionally appropriate corrective lies in statutory codification of pre-legislative consultation rather than judicial invention of a new ground of review, while leaving courts a modest backstop role. The article concludes by situating this silence within the broader question of judicial vision: whether restraint on process review reflects a considered constitutional morality or an unexamined doctrinal gap.

Keywords: pre-legislative consultation; judicial review; manifest arbitrariness; Article 122; deliberative democracy; constitutional morality; comparative constitutional law

I. Introduction

The Constitution of India does not say, anywhere in its text, that a law must be preceded by consultation with the people it will govern. It says a great deal about how power must be distributed once a law exists through Part III's fundamental rights, through the basic structure doctrine, through the elaborate machinery of judicial review under Articles 32 and 226 but it is largely silent on the process by which a Bill becomes an Act. That silence in the text has produced a corresponding silence in the case law. Despite six decades of expansive rights jurisprudence, and despite a string of recent statutes passed with minimal or no public deliberation, no Indian constitutional court has struck down a law purely for the manner of its making.

This is a curious gap, because the raw materials for a different outcome already exist in Indian doctrine. The Supreme Court has told citizens, in cases spanning from Maneka Gandhi v. Union of India[1] to Rajeev Suri v. Delhi Development Authority[2], that the right to know and to participate in public affairs is embedded within Articles 19 and 21. It has developed, in Shayara Bano v. Union of India[3], a doctrine of manifest arbitrariness capacious enough to strike down legislation that is capricious or lacks an adequate determining principle. It has, in cases on parliamentary privilege such as Raja Ram Pal v. Hon'ble Speaker, Lok Sabha[4], acknowledged that legislative autonomy under Articles 122 and 212 is not absolute and yields where constitutional illegality is shown. None of these strands, taken alone, compels a consultation-based standard of review. Taken together, however, they leave the courts uncomfortably close to a doctrine they have never actually announced.

This article treats that proximity as the puzzle worth explaining. It proceeds in six parts. Part II examines the textual architecture Articles 122 and 212 that shields the internal proceedings of legislatures from judicial inquiry, and the judicially maintained distinction between mere procedural irregularity and substantive illegality. Part III surveys three doctrinal areas in which the Court has approached, without crossing, a process-based standard of review. Part IV steps outside the Indian system to examine how two other common-law-influenced jurisdictions the United Kingdom and South Africa have handled the relationship between consultation and

1 Maneka Gandhi v. Union of India, (1978) 1 S.C.C. 248 (India).
2 Rajeev Suri v. Delhi Dev. Auth., 2021 SCC OnLine SC 7 (India).
3 Shayara Bano v. Union of India, (2017) 9 S.C.C. 1 (India).
4 Raja Ram Pal v. Hon'ble Speaker, Lok Sabha, (2007) 3 S.C.C. 184 (India).

legal validity, and asks what those comparisons can and cannot teach India. Part V offers three overlapping explanations, doctrinal, institutional and strategic, for the persistence of judicial silence. Part VI turns normative, arguing that statutory codification of pre-legislative consultation is the more defensible route to reform, with courts retaining a narrow backstop function. Part VII concludes by asking whether this silence should be read as an oversight or as a considered exercise of judicial vision a question that speaks directly to how Indian courts understand their own constitutional role in a deliberative democracy.

The contribution this article seeks to make is therefore modest but, it hopes, useful: it does not propose a fully worked judicial test for reviewing legislative process, nor does it claim that such a test is the only or even the best corrective. It aims instead to render explicit a pattern that has so far been visible only implicitly, scattered across doctrinal areas that are rarely read together arbitrariness review, natural justice, and right-to-know jurisprudence and to ask, with reference to comparative material, why the pattern persists and what, if anything, should be done about it. In this sense the article is as much diagnostic as prescriptive: identifying the shape of the silence matters independently of whatever conclusion one reaches about whether it ought to be broken by courts, by Parliament, or left as it is.

A methodological caveat is in order. This article does not argue that Indian courts ought to have struck down any of the specific statutes that prompted recent controversy the abrogation of Article 370's operative effect, the Citizenship (Amendment) Act, 2019, or the three farm laws of 2020, among others. Its claim is narrower and more doctrinal: that the absence of any consultation-based ground of judicial review in India is a genuine gap in the architecture of constitutional remedies, not a settled or inevitable feature of it, and that the reasons for the gap deserve to be made explicit rather than left implicit in a pattern of non-decision.

II. The Textual Wall: Articles 122 and 212

The starting point for any account of judicial silence on legislative process is textual. Article 122(1) of the Constitution provides that the validity of any proceeding in Parliament shall not be called into question on the ground of an alleged irregularity of procedure; Article 212(1) extends an identical immunity to State Legislatures.[5] On a plain reading, these provisions appear to foreclose exactly the kind of challenge this article contemplates: a petitioner arguing

5 INDIA CONST. art. 122, § 1; id. art. 212, § 1.

that a statute is invalid because the process that produced it including a failure to consult was procedurally deficient.

The Supreme Court has, however, refused to read Articles 122 and 212 as an absolute bar. The foundational case remains the Keshav Singh episode of the mid-1960s, in which a stand-off between the Uttar Pradesh Legislative Assembly and the Allahabad High Court forced the Supreme Court, sitting in an advisory reference, to clarify the boundary between legislative privilege and judicial oversight.[6] The Court's answer, refined over subsequent decades, drew a line between irregularity of procedure, which Articles 122 and 212 place beyond judicial reach, and illegality or unconstitutionality, which they do not. This distinction was reaffirmed and sharpened in Raja Ram Pal v. Hon'ble Speaker, Lok Sabha, the "cash-for-questions" expulsion case, where the Court held that parliamentary autonomy over internal proceedings does not amount to immunity from all judicial scrutiny where a constitutional violation is alleged, even though the Court remained cautious about second-guessing purely procedural choices left to the House's own rules.[7]

Two features of this line of authority matter for present purposes. First, the irregularity/illegality distinction has so far been developed almost entirely in disputes internal to the legislature disputes about privilege, expulsion, suspension and the conduct of business rather than in disputes brought by external petitioners challenging the substantive validity of an enacted statute on the ground that the public was excluded from its formation. The doctrinal vocabulary exists, but it has never been tested against the specific claim that a consultation failure amounts to illegality rather than mere irregularity. Second, and relatedly, the Court's caution in Raja Ram Pal about not converting Article 122 into a dead letter suggests an institutional wariness that would likely resurface, perhaps even more strongly, if the claim before it concerned not an internal disciplinary matter but the wholesale invalidation of a statute already in force.

It is worth pausing on why this distinction, however doctrinally coherent, produces a practical result that insulates consultation failures almost entirely from review. A petitioner challenging, say, the compressed two-day passage of a Bill would face an immediate threshold question: is the absence of consultation a procedural irregularity of the kind Article 122 shields, or does it

6In re Under Article 143 of the Constitution of India (Keshav Singh's Case), A.I.R. 1965 S.C. 745 (India).
7Raja Ram Pal, (2007) 3 S.C.C. 184, ¶¶ 431–433 (India).

rise to a constitutional illegality? Because the Constitution nowhere makes consultation mandatory, and because the Pre-Legislative Consultation Policy of 2014 is an executive circular rather than a binding rule of legislative procedure,[8] a court applying the existing framework has strong textual grounds to characterise a consultation failure as a mere irregularity, however normatively troubling, and stop the inquiry there. Articles 122 and 212 do not need to be read expansively to produce this result; the surrounding absence of any codified consultation duty does the work of narrowing the illegality category to near-vanishing point in this specific context.

This textual account, however, is incomplete on its own. Article 21's due process jurisprudence and Article 14's arbitrariness doctrine both developed, in other contexts, precisely by expanding what counts as illegality beyond what the constitutional text expressly requires. The next Part asks why that expansive method, so effective in other domains, has not been extended to the question of legislative process.

III. Doctrinal Near-Misses

A. Manifest Arbitrariness

The doctrine of manifest arbitrariness offers the clearest doctrinal opening for a consultation-based standard of review, and its trajectory illustrates why the opening has not been used. First articulated in embryonic form in E.P. Royappa v. State of Tamil Nadu[9] and developed through Indira Nehru Gandhi v. Raj Narain[10] and Ajay Hasia v. Khalid Mujib Sehravardi[11], the arbitrariness strand of Article 14 was for decades confined to administrative and quasi-legislative action. Its extension to plenary legislation was contested for years the Constitution Bench in Ashoka Kumar Thakur v. Union of India[12] had suggested that mere unreasonableness could not, by itself, invalidate legislation until Shayara Bano v. Union of India resolved the controversy by holding that manifest arbitrariness, understood as legislative action that is capricious, irrational, or devoid of an adequate determining principle, or that is excessive and

8 Ministry of Law & Justice, Legis. Dep't, Pre-Legislative Consultation Policy, D.O. No. 11(35)/2013-L.I. (Gov't of India, Jan. 2014).
9 E.P. Royappa v. State of Tamil Nadu, (1974) 4 S.C.C. 3 (India).
10 Indira Nehru Gandhi v. Raj Narain, 1975 Supp. S.C.C. 1 (India).
11 Ajay Hasia v. Khalid Mujib Sehravardi, (1981) 1 S.C.C. 722 (India).
12 Ashoka Kumar Thakur v. Union of India, (2008) 6 S.C.C. 1 (India).

disproportionate, can indeed invalidate plenary legislation under Article 14.[13]

Shayara Bano is significant for this article not because it addressed consultation it did not; the case concerned the practice of instant triple talaq but because it establishes that the substantive quality of legislative reasoning can be a constitutional question. A law enacted without any meaningful engagement with affected stakeholders, without impact assessment, and without any recorded justification for departing from stakeholder input is, on one plausible reading, a paradigm case of a decision made "without adequate determining principle." Several of the enactments this article's companion piece examined laws passed within days of introduction, with recorded parliamentary debate times measured in minutes rather than hours would seem to invite exactly this characterisation.

No petitioner appears to have successfully pressed a consultation failure into the manifest arbitrariness frame, and the doctrine's own internal limits explain why. Post-Shayara Bano jurisprudence, including the Supreme Court's discussion of the doctrine in the electoral bonds litigation,[14] has emphasised that manifest arbitrariness examines the legislature's pursuit of a legitimate aim and the proportionality of the means chosen to that aim an inquiry into ends and means, not into the procedural history of enactment. Courts have been careful to distinguish manifest arbitrariness from judicial re-appreciation of legislative wisdom, repeatedly cautioning that the doctrine tests outcomes against constitutional values rather than second-guessing the deliberative process that produced them. The doctrine, in other words, has developed as a tool of substantive review, and its architects have taken visible care to keep it there, precisely because a slide toward procedural review would raise the separation-of-powers concerns Part V of this article discusses.

B. Natural Justice and Article 21

A second near-miss lies in the natural justice jurisprudence that Maneka Gandhi v. Union of India inaugurated. Maneka Gandhi read the audi alteram partem principle into Article 21's guarantee of a fair procedure established by law, holding that administrative action affecting a person's rights must, absent exceptional justification, afford a hearing before the fact.[15] The judgment's own application of this principle was characteristically cautious the Court preferred

13 Shayara Bano, (2017) 9 S.C.C. 1, ¶ 101 (Nariman, J., concurring) (India).
14 Ass'n for Democratic Reforms v. Union of India, 2024 SCC OnLine SC 150, ¶¶ 200–210 (India).
15 Maneka Gandhi, (1978) 1 S.C.C. 248, ¶¶ 5–10 (Bhagwati, J.) (India).

to read the impugned Passports Act as impliedly compliant with natural justice rather than declare it unconstitutional but the doctrinal seed it planted has grown considerably since, extending audi alteram partem deep into administrative and quasi-judicial decision-making.

The seed has not, however, grown into a rule that primary legislation itself must be preceded by a hearing for those it will affect. Indian courts have consistently distinguished between decisions applying a general rule to a particular person to which natural justice self-evidently attaches and the enactment of the general rule itself, which has been treated as a legislative function to which natural justice does not, as a rule, apply at all. This legislative/administrative distinction has deep roots in comparative administrative law and is not unique to India, but its effect in the Indian context is to wall off exactly the terrain this article is concerned with: whichever hearing rights Article 21 has been read to guarantee, they largely stop at the legislature's door.

C. Rajeev Suri and the Right to Know

The clearest and most recent near-miss is Rajeev Suri v. Delhi Development Authority, the Central Vista litigation. The Supreme Court there affirmed, echoing a long line of precedent stretching back to State of U.P. v. Raj Narain,[16] that the citizen's right to know and the government's duty to inform are integral to a democratic form of governance, and situated that right within the constitutional philosophy underlying freedom of speech and expression under Article 19(1)(a).[17] This is, on its face, the strongest judicial statement available for the proposition that participatory governance is not merely good policy but constitutional value.

Yet the Court in Rajeev Suri declined to translate that value into a ground for invalidating the redevelopment project's approval process, upholding the environmental clearance and change-of-land-use decisions under challenge notwithstanding petitioners' objections about the adequacy of public consultation in the approval process. The judgment thus performs, in miniature, the pattern this article traces at the level of the entire legal system: an unambiguous doctrinal affirmation of participatory values, followed by a refusal to give that affirmation remedial teeth. Rajeev Suri is, in this sense, the most important single case for future litigants and scholars to study, because it is the closest the Supreme Court has come to squarely confronting a consultation-based challenge and choosing, deliberately, not to adopt a

16 State of U.P. v. Raj Narain, (1975) 4 S.C.C. 428, ¶ 74 (India).
17 Rajeev Suri, 2021 SCC OnLine SC 7, ¶¶ 292–299 (India).

consultation-based standard of review.

Taken together, these three doctrinal areas show that the Supreme Court possesses every conceptual ingredient necessary to fashion a consultation-based ground of review a substantive-reasonableness doctrine capable of scrutinising legislative process, a natural-justice principle capable of extension beyond individual adjudication, and an explicit right-to-know jurisprudence and has, in each instance, stopped short of combining them. The next Part asks whether other jurisdictions offer a template India could plausibly adapt, before Part V turns to why India's courts have not done so themselves.

D. Testing the Near-Misses Against Recent Legislative Practice

The doctrinal gap identified above is not merely theoretical. A brief review of recent Indian legislative practice suggests the kinds of cases in which a consultation-based standard, had one existed, would have had genuine work to do. The 2019 reorganisation of Jammu and Kashmir, effected through the Constitution (Application to Jammu and Kashmir) Order, 2019 and the accompanying Jammu and Kashmir Reorganisation Act, 2019,[18] was passed by both Houses within two days and without prior discussion involving the residents of the former State or its elected representatives; a manifest-arbitrariness challenge grounded in the absence of any recorded engagement with the affected population would, on the doctrinal logic of Shayara Bano, at least have been arguable, whatever its ultimate merits. The Transgender Persons (Protection of Rights) Act, 2019 was enacted over the sustained objection of the very community it purported to protect, notwithstanding an earlier and more consultative 2016 draft;[19] a natural-justice-inflected reading of Article 21, extended along the lines this Part has traced, would have supplied a doctrinal vocabulary for describing that departure as constitutionally significant rather than merely regrettable. The General Insurance Business (Nationalisation) Amendment Act, 2021, passed after roughly twenty minutes of combined discussion in both Houses,[20] illustrates the outer limit of what a deliberative-adequacy inquiry modelled on Rajeev Suri's right-to-know reasoning might have scrutinised, had the Court been

18 The Jammu and Kashmir Reorganisation Act, No. 34 of 2019, INDIA CODE (2019); C.O. 272, Constitution (Application to Jammu and Kashmir) Order, 2019, Gazette of India, Aug. 5, 2019.
19 The Transgender Persons (Protection of Rights) Act, No. 40 of 2019, INDIA CODE (2019); see PRS Legis. Rsch., Transgender Persons (Protection of Rights) Bill, 2019: Bill Summary (2019).
20 The General Insurance Business (Nationalisation) Amendment Act, No. 20 of 2021, INDIA CODE (2021); see PRS Legis. Rsch., Vital Stats: Monsoon Session 2021 (2021) (recording debate duration).

willing to give that reasoning remedial effect.

None of this is to suggest that any of these statutes would necessarily have been struck down under a consultation-based standard that would depend on the content of the standard eventually adopted, and on facts this article has not independently verified beyond the record available in public reporting. The point is more limited: the doctrinal machinery surveyed in this Part is not merely abstract. It maps onto a recognisable and recurring pattern in recent Indian legislative practice, which is precisely why the silence this article traces has practical, not only theoretical, significance.

IV. Comparative Perspectives

A. The United Kingdom: Consultation as Administrative, Not Legislative, Duty

The United Kingdom offers a body of law on the duty to consult that is, on its face, highly developed considerably more so than India's. The so-called Gunning principles, first articulated by Stephen Sedley QC in argument in R v. Brent London Borough Council, ex parte Gunning[21] and endorsed by the Supreme Court in Moseley v. London Borough of Haringey,[22] require that consultation, once undertaken, occur while proposals remain at a formative stage; that sufficient information be given to permit intelligent consideration; that adequate time be allowed for response; and that the results be conscientiously taken into account before a decision is made. Failure to meet these standards routinely results in judicial review and the quashing of the underlying decision.

The crucial limitation, for comparative purposes, is that the Gunning principles govern the exercise of administrative and delegated powers by public bodies government departments, local authorities, regulators not the enactment of primary legislation by Parliament itself. The doctrine of parliamentary sovereignty forecloses judicial review of an Act of Parliament on process grounds in the way that Gunning permits for a minister's or a council's decision.[23] The English experience therefore demonstrates something narrower than it might first appear: a mature body of consultation law can coexist, in the same legal system, with an entirely unreviewable primary legislative process. If anything, this comparison suggests that India's

21 R v. Brent London Borough Council, ex parte Gunning, (1985) 84 L.G.R. 168 (Eng.).
22 Moseley v. London Borough of Haringey, [2014] UKSC 56, [25] (Lord Wilson) (Eng.).
23 See A.V. Dicey, Introduction to the Study of the Law of the Constitution 39–85 (10th ed. 1959); R (Jackson) v. Att'y Gen., [2005] UKHL 56, [9] (Lord Bingham) (Eng.).

PLCP framework, which similarly operates as an executive-level policy rather than a legislative mandate, sits in a structurally similar position to the UK's administrative consultation regime useful for testing ministerial and departmental rule-making, but institutionally incapable, without more, of reaching Acts of Parliament themselves.

B. South Africa: Consultation as a Condition of Legislative Validity

South Africa presents the sharper contrast, because its Constitution does what India's does not: it makes public involvement a textual, justiciable condition of legislative validity. Sections 59(1)(a), 72(1)(a) and 118(1)(a) of the South African Constitution require the National Assembly, the National Council of Provinces, and the provincial legislatures respectively to "facilitate public involvement" in their legislative processes.[24] In Doctors for Life International v. Speaker of the National Assembly, the Constitutional Court held, per Ngcobo J, that this obligation is a material part of the law-making process and that its breach renders the resulting legislation invalid.[25] The Court accordingly declared the Traditional Health Practitioners Act and the Choice on Termination of Pregnancy Amendment Act invalid for want of adequate public participation in the National Council of Provinces and several provincial legislatures, though it suspended the declarations of invalidity for eighteen months to allow Parliament to cure the defect.[26]

Doctors for Life is instructive precisely because the Constitutional Court confronted, and rejected, the same separation-of-powers objection that looms over any Indian proposal along these lines. The Court acknowledged that courts may not dictate to Parliament how to conduct a consultation, and that reasonableness rather than judicial preference is the standard of review; but it insisted that whether public involvement occurred at all, and whether it was adequate on the facts, is a justiciable question that courts indeed, in South Africa, only the Constitutional Court in the first instance are competent to answer.[27] The decision rests on an explicit textual foothold that India lacks: a constitutional clause obliging legislatures to facilitate public involvement, modelled in part on international instruments such as the International Covenant on Civil and Political Rights.[28]

24 S. Afr. Const., 1996, §§ 59(1)(a), 72(1)(a), 118(1)(a).
25 Doctors for Life Int'l v. Speaker of the Nat'l Assembly 2006 (6) SA 416 (CC) at paras. 111–116 (S. Afr.).
26 Id. paras. 220–223 (order).
27 Id. paras. 62–68, 89–90.
28 International Covenant on Civil and Political Rights art. 25, Dec. 16, 1966, 999 U.N.T.S. 171; Doctors for

The comparison yields two lessons rather than one template. The first is structural: South Africa's outcome was possible chiefly because its Constitution supplies the very textual hook an express duty to facilitate public involvement that Part II of this article showed India's Constitution to lack. Absent an equivalent clause, an Indian court reasoning by analogy to Doctors for Life would face a harder interpretive task, effectively being asked to read an unwritten participation duty into Articles 14, 19 or 21 rather than apply one the text already supplies. The second lesson is normative: Doctors for Life demonstrates that judicial invalidation of primary legislation for a participation failure is not, as such, an unmanageable or illegitimate exercise of judicial power in a constitutional democracy; it is a choice a constitutional order can make, provided it is prepared to accept the institutional consequences including, as the suspended-invalidity remedy in Doctors for Life shows, a willingness to calibrate the remedy so as not to produce sudden legal vacuums.

C. An Interdisciplinary Note: Deliberative Democracy Theory

The doctrinal comparison above can be sharpened by situating it within political theory's account of why consultation matters in the first place. Deliberative democracy theorists, following Habermas's account of legitimacy through rational public discourse,[29] distinguish between the input legitimacy a law derives from having been genuinely deliberated upon and the output legitimacy it derives from producing defensible substantive outcomes.[30] Most Indian constitutional doctrine, including the manifest arbitrariness and natural justice strands surveyed in Part III, is oriented toward output legitimacy: courts ask whether a law's substance is defensible, not whether the process that produced it satisfied deliberative norms. The South African approach in Doctors for Life is unusual precisely because it makes input legitimacy the fact and adequacy of public involvement an independent, judicially enforceable condition of validity, rather than treating it as merely instrumental to producing a better substantive outcome. This theoretical framing helps explain why India's near-misses remain near-misses: a legal system whose doctrinal reflexes are calibrated to output review will naturally resist claims framed in terms of process alone, even where, as with manifest arbitrariness, the vocabulary for such claims already exists in adjacent form. It also clarifies what is normatively at stake in Part VI's argument for statutory reform: codifying a consultation duty is not merely

Life Int'l, 2006 (6) SA 416 (CC) at paras. 90–92.

29 Jürgen Habermas, Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy 287–328 (William Rehg trans., 1996).

30 Fritz W. Scharpf, Governing in Europe: Effective and Democratic? 6–13 (1999).

an administrative convenience but a deliberate move toward recognising input legitimacy as a value the Indian constitutional order should protect in its own right, alongside, rather than subordinate to, the substantive review Indian courts already perform well.

V. Explaining the Silence

Three overlapping explanations account for why India's courts have not travelled the South African road, even though, as Part III showed, they possess doctrinal tools that gesture in that direction.

A. The Doctrinal Explanation

The most straightforward explanation is the one Part II developed: the Indian Constitution, unlike its South African counterpart, contains no textual clause obliging Parliament or the State Legislatures to facilitate public involvement in law-making. Every other participatory guarantee the Supreme Court has recognised the right to know under Article 19(1)(a), the natural-justice content of Article 21, the manifest-arbitrariness content of Article 14 has had to be judicially implied rather than textually located, and implied doctrines have, correspondingly, been developed with visible caution about their outer limits. The absence of a South African-style hook is not merely inconvenient; it changes the character of the judicial task from applying an express duty to inventing one, a task Indian courts have historically approached only where they perceived a compelling and near-unanimous case for doing so, as with the post-Emergency due process turn itself.

B. The Institutional Explanation

A second explanation is institutional self-restraint rooted in separation-of-powers concerns, reinforced by the specific textual architecture of Articles 122 and 212 discussed in Part II. Even in Raja Ram Pal, where the Court asserted jurisdiction to review a legislative expulsion for constitutional illegality, it took pains to disclaim any general power to police the internal procedural choices of the House.[31] A doctrine permitting courts to invalidate a statute for inadequate consultation would require judges to assess, case by case, how much consultation was enough a species of proportionality inquiry into a process that Parliament itself has never been required to standardise. Indian courts have generally been more comfortable reviewing

31 Raja Ram Pal, (2007) 3 S.C.C. 184, ¶ 384 (India).

outcomes against fixed constitutional benchmarks than second-guessing the sufficiency of a deliberative process for which no fixed benchmark exists, and the PLCP's non-binding character means there is, at present, no benchmark against which a court could even measure a shortfall.

C. The Strategic Explanation

A third, more contingent explanation concerns the political salience of the specific statutes most likely to generate this kind of challenge. The laws that best illustrate the rushed-legislation pattern — the 2019 reorganisation of Jammu and Kashmir, the Citizenship (Amendment) Act, 2019, and the 2020 farm laws among them — were also among the most politically contested enactments of the period, several accompanied by sustained public protest and, in some instances, litigation reaching the Supreme Court on other grounds. Courts adjudicating high-salience, high-controversy legislation may be especially reluctant to add a novel process-based ground of invalidation to their toolkit in precisely the cases where doing so would appear most consequential and most exposed to charges of political motivation — whichever way the challenge was resolved. This is speculative, and cannot be verified from the face of the judgments themselves, since courts do not record strategic hesitance as a reason for judgment; but it is consistent with a broader pattern in Indian constitutional adjudication of courts declining novel doctrinal moves in the cases with the highest political stakes, reserving doctrinal innovation for lower-salience litigation where the institutional cost of being wrong is smaller.

D. A Unifying Frame: The Missing Textual Foothold

It is possible to read the doctrinal, institutional and strategic explanations as three faces of a single underlying problem: the absence of what might be called a textual foothold for participatory review. Every successful expansion of Indian constitutional doctrine into new terrain — the due process turn of Maneka Gandhi, the privacy right recognised in Justice K.S. Puttaswamy v. Union of India,[32] the manifest arbitrariness doctrine itself — has proceeded by anchoring the new principle in specific constitutional language, however creatively interpreted, rather than inventing it from institutional first principles alone. Article 21's phrase "procedure established by law" supplied the foothold for natural justice; Article 21's open-ended reference

32 Justice K.S. Puttaswamy v. Union of India, (2017) 10 S.C.C. 1 (India).

to “life” and “personal liberty” supplied the foothold for privacy; Article 14's guarantee of equality supplied the foothold for arbitrariness review. No comparable phrase exists, anywhere in Part III or Part V of the Constitution, that speaks even obliquely to the process by which legislation itself is made. This is the single structural fact that best explains why three otherwise expansive doctrines have each stopped just short of the claim this article examines: Indian constitutional interpretation, for all its creativity, has rarely proceeded by inventing a principle with no textual anchor whatsoever, and legislative process is one of the few significant areas of public law in India where no such anchor, however slender, currently exists.

These three explanations are not mutually exclusive, and the case for judicial silence is almost certainly overdetermined: the doctrinal gap makes an activist ruling harder to justify, the institutional concern makes courts reluctant even where a textual argument might be constructed, and the strategic calculus discourages the attempt in precisely the cases where it would matter most. This overdetermination is itself significant, because it suggests that the silence is unlikely to break through incremental litigation alone. The next Part accordingly asks what a deliberate corrective might look like.

VI. Toward a Way Forward

Two broad correctives are available, and this article's contention is that they are not equally desirable given the institutional analysis in Part V.

A. The Judicial Route

The first is for the Supreme Court to do, by interpretation, what South Africa's Constitution does by text: read a public-involvement duty into Article 21's guarantee of fair procedure, drawing on the pre-existing right-to-know jurisprudence culminating in Rajeev Suri, and treat serious departures from that duty as manifest arbitrariness under Article 14. This route has the advantage of speed it requires no legislative majority and doctrinal continuity, since it would extend rather than invent constitutional principles. Its disadvantages are precisely those Part V identified: it would require courts to develop, without legislative guidance, a workable standard for how much consultation is constitutionally adequate, a task South Africa's Constitutional Court undertook only with an express textual mandate and even then confined to a reasonableness inquiry rather than a fixed checklist. A judicially invented standard, absent that textual anchor, would be more vulnerable to the charge already levelled at the manifest

arbitrariness doctrine by commentators sceptical of its lack of defined principles that it hands courts an unbounded discretion to second-guess legislative judgment.

B. The Statutory Route

The second, and in this article's view the more institutionally appropriate, corrective is statutory codification. A private member's Pre-Legislative Consultation Bill was in fact introduced in the Lok Sabha in 2019, seeking to mandate consultation before the introduction of Bills, but lapsed for want of parliamentary time.[33] Reviving and enacting a version of that Bill fixing minimum consultation periods, requiring published summaries of stakeholder input and reasoned departures from it, and specifying which categories of legislation (perhaps calibrated to the scale of public impact) trigger the requirement would supply exactly the textual and administrable benchmark that Part V identified as missing from the Indian framework. It would also convert the Ministry of Law and Justice's 2014 circular from a non-binding administrative practice into an enforceable legal obligation, closing the two gaps this article's companion piece identified in that circular: the optional character of consultation and the absence of any duty to consider submissions received.

Institutional design choices matter here, and a revived Bill could usefully draw on machinery India already has rather than building entirely afresh. The Department Related Standing Committee system, to which a Bill may optionally be referred after introduction, already performs a limited stakeholder-engagement function, taking evidence from experts and affected groups before reporting back to the House;[34] but referral remains discretionary, and several of the statutes discussed in this article, including the 2019 Jammu and Kashmir legislation and the 2021 Insurance Amendment Act, were never referred to a Standing Committee at all. A statutory consultation requirement could be calibrated to interact with this existing structure for instance, by making Standing Committee referral presumptively mandatory for any Bill that has not already undergone a qualifying pre-legislative consultation, so that the two mechanisms function as alternative, rather than duplicate, routes to the same deliberative end. This design would also address a criticism sometimes made of consultation mandates in comparative practice, including in the English experience with the Gunning principles: that consultation exercises can become box-ticking formalities unless a mechanism

33 The Pre-Legislative Consultation Bill, 2019, Bill No. 41 of 2019 (Lok Sabha) (India) (as introduced).
34 See Rules of Procedure and Conduct of Business in Lok Sabha r. 331E (2023) (India); PRS Legis. Rsch., Vital Stats: Functioning of the Standing Committees (2022).

exists, akin to Gunning's fourth principle, to verify that submissions received whether through public consultation or standing committee testimony were conscientiously considered rather than merely logged.

A statutory duty would, moreover, sidestep the institutional anxiety that has visibly constrained judicial doctrine: because a legislature adopting such a statute binds only its own future conduct rather than having a standard imposed on it externally by courts, it raises none of the separation-of-powers concerns that a judicially invented duty would. It would also, critically, supply the very benchmark whose absence Part V identified as underlying judicial reluctance once a statutory minimum period, publication requirement, or reasoned-response obligation exists, courts would have a determinate standard against which to measure compliance, transforming what is currently an unreviewable political question into an ordinary question of statutory compliance.

C. A Modest Backstop Role for Courts

Even on the statutory route, courts retain an important, if narrower, role: once a consultation duty exists in enacted law, its breach becomes an ordinary question of statutory or constitutional compliance rather than an invitation to invent a new ground of review from nothing. This is the structural lesson of Doctors for Life the Constitutional Court was not asked to decide whether public participation should be constitutionally required, only whether an already-existing requirement had been met. An Indian court applying a hypothetical post-reform PLCP statute would be in the same, more comfortable, interpretive position: applying a legislatively defined standard rather than fashioning one unassisted. This suggests a sequencing point often missed in debates that jump straight to judicial reform: the doctrinal near-misses catalogued in Part III are not evidence that courts are simply unwilling to act, but evidence that the missing textual anchor, not judicial timidity alone, is the binding constraint. Supply the anchor, and the doctrinal building blocks already in Shayara Bano, Maneka Gandhi and Rajeev Suri would very plausibly do the rest.

VII. Conclusion

This article set out to explain a puzzle: why courts that have spoken so consistently of the citizen's right to know, and that possess a manifest arbitrariness doctrine capable in principle of reaching legislative process, have never used either to invalidate a law for want of

consultation. The explanation offered here is not that Indian judges are indifferent to participatory values the case law surveyed in Part III shows the opposite but that the absence of a codified consultation duty, reinforced by the textual immunity of Articles 122 and 212 and by legitimate institutional caution about open-ended process review, has kept every available doctrine one step short of the claim this article examines.

Whether that silence should be read as principled restraint or as an unexamined gap is, in the end, a question about judicial vision about how the Supreme Court understands its own role in relation to the deliberative dimension of democracy, as distinct from the substantive rights the Constitution more explicitly protects. The Court's own jurisprudence on constitutional morality, developed in cases such as Manoj Narula v. Union of India[35] and carried forward through the Navtej Singh Johar[36] and Sabarimala[37] lines of authority, has shown a willingness to hold institutions to standards not always spelt out in constitutional text, where the Court has judged the underlying value to be constitutionally fundamental. Whether participatory law-making belongs in that category, or whether it is more properly left to Parliament to bind itself, is a judgment this article has argued is best made by the legislature in the first instance through a revived and strengthened Pre-Legislative Consultation Bill with courts retaining a considered, if modest, role as the eventual guardians of whatever standard the legislature chooses to set. Until that textual anchor exists, however, the silence this article has traced is likely to persist, not because Indian courts lack the doctrinal vocabulary to end it, but because they have, so far, judged the moment for using it not yet to have arrived.

35Manoj Narula v. Union of India, (2014) 9 S.C.C. 1 (India).
36Navtej Singh Johar v. Union of India, (2018) 10 S.C.C. 1 (India).
37Indian Young Lawyers Ass'n v. State of Kerala, (2019) 11 S.C.C. 1 (India).